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No. 85-625

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

NORTHERN CALIFORNIA RETAIL CLERKS UNION AND FOOD EMPLOYERS JOINT PENSION TRUST FUND, a trust fund,
Petitioner,

VS.

AWARD SERVICE, INC.,
Respondent.

BRIEF OF RESPONDENT AWARD SERVICE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an employer has an implied private right of action to enforce the remedies provided by Section 403(c)(2)(A) of ERISA which permits recovery of an employer's mistaken contributions to an employee benefit plan?

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vs.

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BRIEF OF RESPONDENT AWARD SERVICE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARTIES TO THE PROCEEDINGS

There were no parties to the proceedings in the United States Court of Appeals for the Ninth Circuit other than those set forth in the caption of the case before this Court.[1]

[1] Petitioner Northern California Retail Clerks Union and Food Employers Joint Pension Trust Fund will be referred to herein either as "Petitioner" or "Trust Fund." Respondent Award Service, Inc. will be referred to as "Respondent" or "Award Service."

OPINIONS BELOW

The district court's order is not officially published. It is unofficially published at 101 CCH Labor Cases ¶ 11,026. It is reproduced and attached to the Petition as Appendix B.

The Court of Appeals issued two opinions, on January 3, 1985 and June 19, 1985. The decision reached in both were the same, although the reasoning was changed somewhat. The first opinion, reported unofficially at 102 CCH Labor Cases ¶ 11,317, was withdrawn after withdrawal of the Ninth Circuit Court of Appeals opinion in *Chase v. Trustees of Western Conference of Teamsters Pension Fund,* upon which the court partly relied in deciding this case. After a new opinion was issued in *Chase,* reported at 753 F.2d 744 (9th Cir. 1985), a new opinion was in turn issued in this case. It is reported at 763 F.2d 1066, and is reproduced and attached to the Petition as Appendix A.

On or about July 23, 1985, Petitioner filed a motion to recall mandate with the Ninth Circuit. The court denied this motion in an unpublished opinion, titled Order for Publication, dated October 24, 1985. It is reproduced and attached hereto as Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1985. It is reproduced and attached to the Petition as Appendix C. On July 19, 1985, Petitioner filed a petition for rehearing with the Court of Appeals. The Ninth Circuit has not yet ruled on this petition. Petitioner properly alleges that jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 88 Stat. 832 (1974) and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980). The relevant text and citation of these statutes are correctly set forth in the Trust Fund's Petition.

STATEMENT OF THE CASE

A. Facts.

This case comes up from an order of the United States District Court for the Northern District of California, dismissing Respondent's entire complaint for lack of subject matter jurisdiction. The complaint is reproduced and attached to the Petition as Appendix D.

Award Service, an "employer" as defined in 29 U.S.C. § 1002(5), filed a complaint in the United States District Court for the Northern District of California against the Trust Fund, a multiemployer pension fund, for recovery of contributions made to the Trust Fund in violation of Section 302(c) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186(c). From September 1970 through March 1981, Award Service made contributions to the Trust Fund (Appendix A, pp. 1-2). At all times during this period, Award Service was not a party to any written agreement providing the basis upon which payments were to be made to the Trust Fund.[2]

On June 3, 1982, Award Service demanded a refund of these contributions on the ground that their payment had violated Section 302(c)(5)(B) of the LMRA and that it was consequently illegal for the Trust Fund to retain them. The Trust Fund, however, refused to refund the allegedly illegal contributions, and Award Service filed suit approximately one year later to recover the contributions (Appendix A, p. 2).

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[2] On or about March 1981, the United Food and Commercial Workers Union, Local 428, one of the unions which is a sponsor of the Trust Fund, filed a motion to compel arbitration against Award Service in the Superior Court of California in and for the County of Santa Clara. On May 27, 1981, the Honorable Edward L. Brady, in and for the Superior Court of California, County of Santa Clara, signed an order which, stated *inter alia*, that "at no time did a collective bargaining agreement and/or agreement exist between Award Service, Inc., and United Food and Commercial Workers Union, Local 428 . . . " (Appendix D, p. 3).

B. Procedural History.

The Respondent's complaint was filed in the United States District Court for the Northern District of California on July 14, 1983. It alleged six claims for relief. The first was for declaratory judgment under 28 U.S.C. § 2201; the second was for recovery of contributions under LMRA section 302, 29 U.S.C. § 186; the third, fourth and sixth claims were under state law seeking restitution; and the fifth claim was under Section 403(c)(2)(A) of ERISA, 29 U.S.C. § 1103(c)(2)(A) (Appendix D).

Petitioner filed a motion to dismiss in the district court. In opposition, Respondent asserted two grounds for the court's jurisdiction to provide restitution of the allegedly illegal contributions. First, it contended that restitution of illegally paid contributions may be ordered under Section 302(e) of the LMRA, which grants federal courts the jurisdiction to restrain violations of Section 302. Second, Award Service argued that Section 403(c)(2)(A) of ERISA confers on employers a right to the refund of contributions made as a result of a mistake of law or fact. The district court rejected both of these arguments and granted Petitioner's motion to dismiss the complaint in its entirety (Appendix A, p. 2).

Award Service appealed the district court's order of dismissal to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the district court on the question of subject matter jurisdiction and remanded for further proceedings. First, the court held that ERISA Section 502(e), 29 U.S.C. § 1132(e), expressly conferred jurisdiction on the district court to entertain the claim for relief under ERISA Section 403(c)(2)(A), following *Fentron Industries, Inc. v. National Shopmen Pension Fund,* 674 F.2d 1300 (9th Cir. 1982). Second, the court held that the district court had general federal question jurisdiction, under 28 U.S.C. § 1331, to determine whether an implied right of action exists under ERISA Section 403(c)(2)(A) for return of mistakenly paid contributions (Appendix A, pp. 2-3).

Having concluded that the district court had subject matter jurisdiction, the Court of Appeals proceeded to find that an employer has an implied right of action under ERISA Section

403(c)(2)(A), which provides for the fund to return contributions made under mistake of fact or law, despite omission of employers from the class of persons expressly empowered to sue under ERISA Section 502(a), 29 U.S.C. § 1132(a). Applying the criteria set forth in *Cort v. Ash*, 422 U.S. 66 (1975), the Court of Appeals found that the Multiemployer Pension Plan Amendments Act of 1980, which added subparagraph (ii) to Section 403(c)(2)(A) concerning payments made by an employer under a mistake of fact or law, was designed for the benefit of employers; that ERISA Section 403(c)(2)(A)(ii) implicitly showed a congressional intent to create a right or action in favor of employers; that implying such a right furthers the congressional scheme of permitting restitution of contributions when equity favors such restitution; and that no question of federal-state comity is raised given the preemptive effect of ERISA. Thus, the court held that Award Service did have an implied right of action for restitution of the mistaken contributions under ERISA Section 403(c)(2)(A) (Appendix A, pp. 3-5).

After this Court issued its opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, ____ U.S. ____, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (June 27, 1985), Petitioner moved the Court of Appeals to recall its mandate in this case. In an Order for Publication, dated October 24, 1985, the Court of Appeals for the Ninth Circuit denied Petitioner's motion, holding that its decision in this case was not inconsistent with *Massachusetts Mutual Life Insurance Co. v. Russell* (Appendix E).[3]

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Ninth Circuit Properly Applied The Criteria Set Forth In *Cort v. Ash* In Determining That An Implied Right Of Action Exists Under ERISA Section 403.

The Ninth Circuit found that an employer's right of action to enforce the remedy provided in Section 403(c)(2)(A)(ii) could

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[3] Petitioner has also petitioned the Court of Appeals for a rehearing. The court has yet to rule on this petition.

be implied in accordance with the criteria established by this Court in *Cort v. Ash,* 422 U.S. 66 (1975) (Appendix A, pp. 3-4).

1. Section 403(c)(2)(A) Was Clearly Designed For The Benefit Of Employers.

ERISA Section 403(c)(1) sets forth the general rule that a plan's assets can never inure to the benefit of an employer. However, prior to the 1980 amendment, Section 403(c)(2)(A) provided a narrow exception, allowing contributions to be returned to the employer if the contributions were made as a result of a mistake of fact. The amendments of 1980 broadened the employer's right so that a trust fund is now permitted to return contributions to an employer which are the result of a mistake of fact *or* a mistake of law. Thus, as the Ninth Circuit found, the 1980 amendment, which broadened the circumstances under which an employer could recover mistaken contributions, was clearly designed for the benefit of employers.

2. Congress' Intent To Create A Private Right Of Action In Favor Of The Employer Is Implicit In Section 403(c)(2)(A).

The legislative history of Section 403(c)(2)(A), as amended, does not evince an express congressional intent to grant a private right of action in favor of an employer. This Court, however, has held that "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis,* 444 U.S. 11, 18 (1979) (citing, *Cannon v. University of Chicago,* 441 U.S. 677, 694 (1979)).

In *Transamerica Mortgage, id.*, this Court held that a private right of action could be implied into Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-15, which declared certain contracts void, even though there was no express grant of a private right of action. The Court said:

> In the case of § 215, we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness

> under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.

444 U.S. at 18.

The Court, in *Transamerica,* found that the remedy of rescission, provided by Section 215 necessarily contemplated resort to a judicial forum for enforcement of that remedy. Similarly, in this case, the remedy of restitution provided by Section 403(c)(2)(A), necessarily contemplates resort to a judicial forum for determination and enforcement of the right to restitution of mistaken contributions.

Furthermore, the legislative history of MPPAA, as it appears in the Congressional Record, states in pertinent part:

> [t]he Committees have concluded that a contribution made due to a mistake of law should be eligible for return to the employer if specified conditions are met.

126 Cong. Rec. 20208 (1980). By stating that contributions should be returned "if specified conditions are met," Congress implicitly contemplated that a neutral judicial forum should determine whether "specified conditions are met" for an employer to recover mistaken contributions.

The Ninth Circuit found implicit in Section 403 (c)(2)(A) that Congress intended to create a right of action in favor of an employer to recover for mistaken contributions. As the court realized, "[w]ithout such a remedy, the decision to return contributions mistakenly paid would be left solely to the interested trustee; (Appendix A, pp. 3-4). The issue of whether or not equitable factors militate in favor of returning mistakenly paid contributions should properly be litigated before a judicial forum. *See also Ethridge v. Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982) (court may decide whether mistaken

contributions were made by an employer since a plan administrator would be at liberty to either never make the appropriate determination or determine that no contributions were made by mistake.)

3. A Private Right Of Action In Favor Of Employers Furthers The Congressional Scheme Of Permitting Restitution Of Mistaken Contributions.

The underlying purpose of Section 403(c)(2)(A) is to permit recovery by employers for contributions mistakenly paid. As the Ninth Circuit found, providing an employer with a private right of action to recover mistaken contributions clearly furthers the congressional purpose to permit employers to recover for mistaken contributions when equitable factors militate in favor of such restitution. Indeed, it is the only way of enforcing the employer's right to restitution after a trustee or plan administrator denies the employer's request.

4. Principles Of Federal-State Comity Render A Cause Of Action Appropriate.

The parties do not dispute that the Ninth Circuit correctly found that this criterion was satisfied.

Thus, the Ninth Circuit properly applied the criteria set forth in *Cort v. Ash* and properly held that an employer has an implied private right of action to enforce the remedy provided by Section 403(c)(2)(A) of ERISA.

B. The Ninth Circuit's Ruling Is Consistent With *Massachusetts Mutual v. Russell.*

Petitioner seeks to show a conflict between the Ninth Circuit's decision and this Court's recent decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, ____ U.S. ____, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (June 27, 1985). As the Ninth Circuit made clear in its Order for Publication, the two cases are distinct.

In this case, the issue is whether an employer, who is not expressly covered by ERISA Section 502, has an implied right of action to enforce ERISA Section 403(c)(2)(A), which provides for the return of contributions made under mistake of fact or law. In *Massachusetts Mutual*, the issue was whether a beneficiary,

who is expressly covered by ERISA Section 502, could hold a fiduciary of an employee benefit plan personally liable for extra-contractual damages caused by improper or untimely processing of benefit claims, 87 L. Ed. 2d at 99. This Court ruled that the plaintiff lacked a right of action because the remedies sought, compensatory and punitive damages, were not expressly provided for in "ERISA's interlocking, interrelated, and independent remedial scheme. . . ." 87 L. Ed. 2d at 106. The Court noted that under different circumstances, such as a denial of benefits, the plaintiff "would have had a panoply of remedial devices at her disposal." *Id.*

In contrast, the Ninth Circuit in this case supported its decision with the statutory language of the 1980 amendments to Section 403(c)(2)(A), which added subsection (ii) which permits the remedy sought in this case, return of mistaken contributions. Thus, the Ninth Circuit, in its Order for Publication denying Petitioner's motion to recall mandate, found that its decision was not inconsistent with *Massachusetts Mutual.* In distinguishing *Massachusetts Mutual*, the Ninth Circuit said:

> Our case was quite different. The issue was whether a right of action was to be implied in favor of an employer who had mistakenly paid more than $167,000 into a pension fund. There was no complex and interrelated system of express remedies in ERISA that related to such a claim. There was a positive indication by Congress that mistakenly paid contributions *could* be returned to the contributor because § 403(c)(2)(A)(ii) of ERISA . . . expressly permitted such payments. That remedy was clearly enacted for the benefit of employers who mistakenly made payments to a fund, but there existed no express remedy to effectuate that congressional purpose.

(Appendix E, p. 2; emphasis in original).

Thus, Petitioner's attempt to demonstrate an inconsistency between the Ninth Circuit's decision and the decision of this Court in *Massachusetts Mutual* falls short. The two decisions involved completely different factual circumstances and the

courts did not interpret identical statutory provisions. Therefore, the cases are not in conflict.

C. The Ninth Circuit's Decision Creates No Direct Conflict With Any Cited Circuit Court Of Appeals Decision.

1. The Cases Cited By Petitioner Are Factually Distinct And Do Not Rely For Legal Support On ERISA Section 403.

Petitioner cites several cases in apparent conflict with the Ninth Circuit's decision. However, these cited cases involved different facts and did not address whether an employer's right of action can be implied from Section 403(c)(2)(A) of ERISA, as amended in 1980.

The Third Circuit's decision in *U.S. Steel v. Pennsylvania Human Relations Commission,* 669 F.2d 124 (3d Cir. 1982), and the Sixth Circuit's decision in *Great Lakes Steel Division v. Deggendorf,* 716 F.2d 1101 (6th Cir. 1983), involved the narrow issue of whether an employer has a right of action as a fiduciary under the jurisdictional grant of ERISA Section 502. In *U.S. Steel,* the district court had held that an employer could not be a "fiduciary" within the meaning of Section 502. The Third Circuit reversed, stating:

> Our decision is a narrow one: United States Steel has standing to sue under 29 U.S.C. § 1132(a)(3) as a 'fiduciary,' notwithstanding that it is also an 'employer.'

669 F.2d at 128. In *Deggendorf,* the Sixth Circuit, following the decision in *U.S. Steel,* also held that an employer could sue as a fiduciary under ERISA Section 502. Both courts issued narrow decisions construing the express statutory language of ERISA, Section 502. Neither court addressed the issue of whether there is an implied right of action under any section of ERISA.

Similarly, in *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.,* 700 F.2d 889 (2d Cir. 1983), *cert. denied,* 464 U.S. 845 (1983), the issue was whether a pension fund could assert a cause of action under ERISA against a consulting firm, which was hired by the fund, for breach of its fiduciary duties. In *Tuvia Convalescent Center, Inc. v. Hospital*

Employees, 717 F.2d 726 (2d Cir. 1983) the issue was whether an employer has standing under ERISA to sue the funds for violating their fiduciary duties under ERISA. *Id* at 728. Neither case required the Second Circuit to interpret the meaning and intent of the 1980 amendments to Section 403(c)(2)(A) of ERISA.

In this case, the employer is suing under Section 403(c)(2)(A) of ERISA which, as the Ninth Circuit found, was specifically designed to permit an employer to recover for mistaken contributions. Thus, in construing ERISA as implying a right of action, the Ninth Circuit relied on the meaning and intent of Section 403(c)(2)(A), which was not applicable in the prior judicial decisions which dealt only with Section 502(a)(3).

The Second Circuit in both *Pressmen* and *Tuvia* criticized the Ninth Circuit's holding in *Fentron Industries, Inc. v. National Shopmen Pension Fund,* 674 F.2d 1300 (9th Cir. 1982). The Ninth Circuit relied on *Fentron* in this case to establish that an employer has subject matter jurisdiction under Section 502(e) of ERISA to bring an action if the employer alleges specific and personal injury (Appendix A, p. 3). However, this finding was not essential to the court's holding as the Ninth Circuit also ruled that the district court had subject matter jurisdiction under 28 U.S.C. § 1331. Assuming, *arguendo,* that the district court did not have subject matter jurisdiction under the rationale of *Fentron,* the court still had federal question subject matter jurisdiction over the dispute involving Section 403(c)(2)(A), under 28 U.S.C. § 1331. The issue presented here is whether the Ninth Circuit was correct in implying a right of action under Section 403(c)(2)(A) and not whether the court was correct in relying on *Fentron* or whether the holding of *Fentron* was correct.

2. The Vast Majority Of Cases, On Point, Are Consistent With The Ninth Circuit's Decision.

The Ninth Circuit's decision is consistent with the majority of cases which authorize private causes of action for restitution of mistaken contributions when equitable factors militate in favor of such restitution. *See Teamsters Local 639-Employers Trust Fund v. Cassidy Trucking, Inc.,* 646 F.2d 865, 868 (4th Cir. 1981) (held that the district court should have considered whether employer

was entitled to restitution of mistaken contributions if equity requires); *E.M. Trucks, Inc. v. Central States Southeast and Southwest Areas Pension Plan,* 517 F. Supp. 1122 (D. Minn. 1981) (held that district court could consider whether equitable principles required restitution of mistaken contribution to employer); *Ethridge v. Masonry Contractors, Inc.,* 536 F. Supp. 365, 368 (N.D. Ga. 1982) (held that employer was entitled, under Section 403(c)(2)(A), to set-off of overpayments against underpayments made to benefit plans); *Central States Southeast and Southwest Areas Pension Plan v. Wholesale Produce Supply Co.,* 478 F. Supp. 884 (C.D. Minn.), *affirmed,* 611 F.2d 694 (8th Cir. 1979) and *Service Employees International Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Service, Inc.,* 504 F. Supp. 197 (D.D.C. 1980) (offset allowed to employer for overpaid contributions without consideration of permissive phraseology of Section 403(c)(2)(A)); *but see, Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia,* 549 F. Supp. 307, 312 (E.D. Pa. 1982), *aff'd mem.,* 720 F.2d 661 (3rd Cir. 1983) (Section 403(c)(2)(A) permissive only; no implied right for employer because restitution could threaten integrity of funds).

To the extent that any disagreement exists in any circuit with the Ninth Circuit's holding or reasoning, such disagreement is, at most, in its infancy. Indeed, only one district court, in a decision affirmed without opinion by the Third Circuit, has reached a contrary opinion. Therefore, it is premature for the Court to decide this issue as a direct conflict between the circuits regarding the interpretation of Section 403(c)(2)(A) is not yet evident.

CONCLUSION

Respondent respectfully submits that this petition for *certiorari* should be denied. The Ninth Circuit's ruling that the employer has a private right of action to recover mistaken contributions under Section 403(c)(2)(A)(ii) of ERISA is consistent with this Court's decisions in *Massachusetts Mutual v. Russell* and *Cort v. Ash*. The Petition evinces no direct conflict between the circuit courts of appeals and, thus, the case does not warrant review.

DATED: December 23, 1985.

Respectfully submitted,

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Appendix E

In the United States Court of Appeals
For the Ninth Circuit

CA No. 83-2625

Award Service, Inc.,
Plaintiff/Appellant,

vs.

Northern California Retail Clerks Union and
Food Employers Joint Pension Trust Fund, a trust fund,
Defendant/Appellees.

[Filed October 24, 1983]

ORDER FOR PUBLICATION

BEFORE: TANG, CANBY AND BEEZER, CIRCUIT JUDGES.

Defendant-Appellee Northern California Retail Clerks Union and Food Employers Joint Pension Trust Fund ("Pension Trust") moves this court to recall its mandate, issued pursuant to our decision in this case, reported at 763 F.2d 1066 (9th Cir. 1985). Pension Trust contends that our decision is undermined by the subsequent decision of the Supreme Court of the United States in *Massachusetts Mutual Life Ins. Co. v. Russell,* 105 S. Ct. 3085 (1985). We reject the contention and deny Pension Trust's motion.

In *Massachusetts Mutual,* the Supreme Court refused to imply a remedy in favor of a beneficiary of an employee benefit plan against a trustee of that plan for untimely processing of a benefit claim. In so doing, the Court indicated that it was reluctant to "fine-tune" the carefully crafted enforcement scheme of the Employee Retirement Income Security Act (ERISA). 53 U.S.L.W. at 4942. The Supreme Court's language and ruling, however, was addressed to the situation before it, in which ERISA provided specifically for various kinds of recovery against a trustee, but only in favor of the plan. *Id.* at 4940. Similarly, ERISA provided various express remedies for a beneficiary, but compensatory and punitive damages against a trustee was not

among them. *Id.* at 4942. Because the text of ERISA, the statutory structure, and the legislative history indicated that Congress intended the judiciary not to imply a cause of action against a trustee for untimely processing of a beneficiary's claim, the Supreme Court refused to imply one. *Id.*

Our case was quite different. The issue was whether a right of action was to be implied in favor of an employer who had mistakenly paid more that $167,000 into a pension fund. There was no complex and interrelated system of express remedies in ERISA that related to such a claim. There was a positive indication by Congress that mistakenly paid contributions *could* be returned to the contributor, because § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), expressly permitted such payments. That remedy was clearly enacted for the benefit of employers who mistakenly made payments to a fund, but there existed no express remedy to effectuate that congressional purpose. *See* 763 F.2d at 1068. It was therefore appropriate, and not inconsistent with *Massachusetts Mutual,* to imply a remedy in favor of the employer under the doctrine of *Cort v. Ash,* 422 U.S. 66 (1975).

The motion to recall the mandate of this court is DENIED.